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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 392.

UNION PROPERTIES, INC.,

Petitioner,

vs.

FRANK M. BRENNAN,
Successor Treasurer of Cuyahoga County,
and
RICHARD C. WERNER,
Administrator of Estate of Leslie R. Monroe,
Deceased,

Respondents.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

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October 25, 1956.

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

To the Honorable Earl Warren, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

QUESTION PRESENTED.

Respondent cannot adopt the question as presented by the petitioner because that question was neither involved nor presented before, nor decided by, the federal courts below in this case.

The question presented on petition for certiorari we submit is:

Did the Federal District Court have jurisdiction to determine the valuation of petitioner's real estate, the

comparative over-assessment, if any, and order the recovery of taxes already paid when there was pending a state statutory proceeding, voluntarily instituted by the petitioner, as a complaint to the valuation and assessment of such real estate with the right of review and appeal to the courts?

The district and circuit courts said no. We agree.

Implicit in this question and in the opinion of the U. S. Court of Appeals are these questions:

1. Does Ohio law fail to provide a full, complete and adequate remedy to the petitioner in the state courts?

2. Does a complaint that commercial real estate has been classified distinct from residence property for purposes of taxation, permitted by the United States Constitution, but purportedly prohibited by the Constitution of the State of Ohio, present a federal question?

The district and appellate courts below answered both of these questions no. We agree.

STATEMENT OF THE CASE.

On September 1, 1954 appellant (petitioner here) filed in the District Court this action to recover monies paid voluntarily as taxes under written protest, claiming that real estate in Cuyahoga County as a whole had been valued and assessed for the year 1952 at not more than fifty percent of its actual value, but that real estate used for commercial purposes, such as appellant's property, was valued and assessed at a substantially higher percentage of actual value; and appellant seeks to recover the sum it has determined to be the excess amount so paid

as an allegedly illegal and unconstitutional assessment. (Appendix 1a and 2a of appellant's brief in Court of Appeals, filed on certiorari as part of record.)

Previously, on April 23, 1953, Union Properties, Inc. had filed a complaint before the Board of Revision of Cuyahoga County, Ohio, concerning the 1952 tax valuation and assessment of the same property. This complaint so voluntarily instituted by appellant was still pending before the said board of revision at the time it filed a suit in federal court (appellant's appendix 6a). Thereafter, after a full hearing the board of revision on November 18, 1954 denied the complaint. The appellant on December 16, 1954 appealed said cause to the Board of Tax Appeals of the State of Ohio.

On January 13, 1955 appellee (respondent here) filed in the District Court a motion to dismiss the complaint of Union Properties, Inc. (appellant's appendix 1a) as follows:

1. To dismiss the action for the reason that at the time of the filing thereof there was pending, and at all times since there has been pending, a statutory proceeding authorized under the laws of the State of Ohio before the Board of Revision of Cuyahoga County, Ohio, instituted by plaintiff as a complaint as to the valuation and assessment of the real property described in this action, with the right for review and appeal to the courts, all of which more clearly appears in the affidavit hereto annexed as Exhibit A and made a part hereof in support of paragraphs 1, 2 and 3 of this motion, and said statutory proceeding affords plaintiff a full, complete and adequate remedy.

2. To dismiss the action on the ground that the Court lacks jurisdiction.

3. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

The District Court granted the said motion and on June 27, 1955 dismissed the complaint, saying the taxpayer was "still pursuing certain effective administrative remedies under the Ohio" law. (Record, appellant's appendix 2a and 7a.)

Although the U. S. District Court had entered judgment June 27, 1955 that the federal courts lacked jurisdiction, Union Properties, Inc. thereafter chose to abandon state proceedings. Specifically, it failed to appeal a ruling of the Ohio Board of Tax Appeals of November 23, 1955. The ruling found the property correctly valued at $13,501,200 and affirmed the county board of revision (Pet. cert. 20).[1] The taxpayer did not take advantage of R. C. 5717.04, which authorizes an appeal from the Ohio Board of Tax Appeals' decision to the supreme court of the state or to the court of appeals for the county in which the real estate lays, or in which the taxpayer resides. (At no time did Union Properties, Inc. pursue the remedy provided by R. C. 5717.05, being an appeal from the board of revision to the court of common pleas.)

Instead Union Properties, Inc. chose to appeal the district court's finding of no federal jurisdiction to the U. S. Court of Appeals for the Sixth Circuit. April 20, 1956 that court affirmed the judgment of the district court, and rehearing was denied June 11, 1956.

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[1] We refer to the decision of the Ohio Board of Tax Appeals because Petitioner included its text in the Appendix (Pet. 20), although it is not part of the record in this case. We note page 20 in the Board's opinion the comment that expert witnesses for the appellee testified the property had a market value of $21,000,000. Tax valuation was fixed at $13,501,200.

The Circuit Court did not say, as petitioner's question implies and as its counsel argues in his petition for certiorari (Pet. cert. 5) that existence of jurisdiction by a state court necessarily defeats federal jurisdiction. The short opinion speaks for itself. The appellate court said, "Ohio law provides a full, complete and adequate remedy to the appellant in the state courts." (Pet. cert. 18.) Accordingly, this case is not within that class of cases where federal jurisdiction exists because obviously and patently the state does not provide an adequate remedy.

Inasmuch as nothing in the opinion below asserts that state jurisdiction necessarily defeats federal jurisdiction, it does not avail petitioner here to refute that proposition. We submit a reading of the Circuit Court's opinion will disclose its findings that the courts of Ohio were open to petitioner, that adequate remedies were provided by Ohio laws, that petitioner had instituted a complaint pursuant to R. C. 5715.19 of Ohio, and that:

> "The courts of Ohio are open to appellant to contest the alleged unlawful discrimination under Ohio taxing statutes; and, in the event that the highest court of Ohio should decide against it, appellant has the right to appeal to the Supreme Court of the United States upon an allegation that the Fourteenth Amendment to the Federal Constitution has been violated." (Pet. cert. 18.)

ARGUMENT.

Did the Federal District Court have jurisdiction to determine the valuation of petitioner's real estate, the comparative over-assessment, if any, and order the recovery of taxes already paid when there was pending a state statutory proceeding voluntarily instituted by the petitioner, as a complaint to the valuation and assessment of such real estate with the right of review and appeal to the courts?

1. Does Ohio law fail to provide a full, complete and adequate remedy to the petitioner in the state courts?

Not only did the District Court and the Court of Appeals hold that the Ohio law was adequate (District Court Opinion, Pet. for cert. 14, and Sixth Circuit opinion, Pet. 18), but the United States Supreme Court has previously held that the Ohio tax statutes provide an adequate remedy. This Court passed on this question recently in *Alger v. Peck, Ohio Tax Comm'r,* 74 S. Ct. 605, 98 L. ed. 1148 (1954). Justice Reed concluded this opinion by saying that "Congress under 28 U. S. C. 1341 left the burden on the taxpayer to follow the required state procedure, rather than to determine the alleged Federal issues primarily in the federal courts." 98 L. ed. at 1150.

Union Properties' argument on page 6 of the petition for certiorari that the state remedy reaches only "true value" and not the issue of discrimination in levying the tax was rejected in *Alger v. Peck,* 74 S. Ct. at 607, 98 L. ed. at 1150. Here Justice Reed said:

> "Appellants contend that the Ohio remedy does not conform with that required by sec. 1341 of the Judicial Code and that they will be irreparably harmed if enforcement of the statute is not enjoined pending determination of this appeal. In particular

they argue that the Ohio procedure is not speedy, that it is futile to exhaust the administrative procedures because such bodies cannot pass on constitutional issues * * *.

"The Ohio statutes accord an adequate remedy to appellants which they have not yet exhausted. The fact that such procedures cause inconvenience and expense, and that appellant may eventually prevail are not controlling. In enacting sec. 1341 Congress merely adopted the rule that where orderly procedures for litigating issues have been provided, such procedures must prevail. Cf. Myers v. Bethlehem Shipbuilding Corp., 303 US 41, 82 L. ed. 638, 58 S. Ct. 459; Petroleum Exploration, Inc. v. Public Service Com., 304 US 209, 82 L. ed. 1294, 58 S. Ct. 834. I do not read that section to preclude states from prescribing resort to administrative remedies before court review. This is not a case where the state remedy is unknown or such remedy is unavailable. Cf. Spector Motor Service, Inc. v. O'Connor, 340 US 602, 95 L. ed. 573, 71 S. Ct. 508; Georgia R. & Banking Co. v. Redwine, 342 US 299, 96 L. ed. 335, 72 S. Ct. 321."

The petitioner here had pending at the time of the District Court's ruling which granted our motion to dismiss, its complaint to the Board of Revision of Cuyahoga County, Ohio, under 5715.19 of the Revised Code of Ohio. It reads:

"A complaint against any valuation or assessment which appears upon the tax duplicate of the then current year may be filed on or before the time limited for payment of taxes for the first half year, or at any time during which taxes are received by a county treasurer without penalty for the first half year. Any taxpayer may file such a complaint as to the valuation or assessment of his own or another's real property. * * *

> "* * * Each complaint shall state the amount of *overvaluation,* undervaluation, *or illegal valuation* complained of, and the treasurer may accept any amount tendered as taxes upon property concerning which a complaint is then pending, computed upon the claimed valuation as set forth in the complaint, and if such tender is not accepted no penalty shall be assessed because of the nonpayment thereof. * * *" (Italics added.)

5715.21 R. C. provides that the payment of the tax shall not abate the complaint or appeal.

5715.22 R. C. provides for a credit or repayment of overpaid taxes as a result of the determination of such complaint.

5717.01 R. C. et seq. provides for an appeal from the county board of revision to the board of tax appeals.

5717.05 R. C. authorizes as an alternative to the appeal to the board of tax appeals, an appeal from the decision of the county board of revision to the court of common pleas of the county.

5717.04 R. C. authorizes an appeal from the decision of the board of tax appeals to the supreme court of the state or the court of appeals for the county in which the property taxed is situated or in which the taxpayer resides.

Appellant had thus voluntarily chosen a remedy provided by state law and the proceeding was thus pending before a quasi-judicial body with the right of review and appeal to the courts. By the act of the appellant the state quasi-judicial and judicial bodies had acquired jurisdiction and such state jurisdiction must be exhausted and is exclusive. 26 *R. C. L.* 452, section 408.

An alternative remedy, which petitioner conceded below it had, confers jurisdiction on the courts of common pleas of the state to enjoin the collection of illegal

taxes and assessments and to entertain actions to recover them when collected. See R. C. 2723.01.

The foregoing remedies were cited in the opinion of the Circuit Court. (A clerical error appeared in two of the opinion citations in that 5717.09 should be 5717.06, and 2723.06 should be 2723.05. See Pet. cert. 5 and 18.)

Petitioner was not and could not be denied its rights under the Federal Constitution because it later voluntarily failed to appeal from the adverse decision of the Board of Tax Appeals and so permitted such decision to become final and conclusive as provided by R. C. 5717.03, which reads in part:

> "The decision of the board may affirm, reverse, vacate, or modify the tax assessments, valuation, determinations, findings, computations, or orders complained of in the appeals or applications determined by it, and its decisions shall become final and conclusive for the current year unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. * * *"

(R. C. 5717.04 spells out appellate procedure.)

The position of counsel for the appellant that state tribunals disregard constitutional discrimination is not in accord with the position taken by the same counsel in *Lincoln Electric Co. v. Board of Revision of Cuyahoga County, Ohio,* cause No. 23635. There, maintaining that the Ohio "Board is not barred from giving weight to discrimination issue" (appellant's br. for Lincoln Electric 35), *American Steel & Wire Co. v. Board of Revision of Cuyahoga County,* 139 O. S. 388, 40 N. E. 2d 426 (1942) was distinguished. This case is now cited on petition for certiorari as authority ~~that~~ the Ohio courts *cannot* give weight to the discrimination issue (Pet. cert. 6). We could

not distinguish this case better than opposing counsel did in their Lincoln Electric brief at page 36:

> "In that case * * * it was the taxpayer who asserted that, since it had proved true value in money, it had fully satisfied its statutory burden and that it could not be required to go further and prove also that the reduction it sought would not produce inequality and discrimination."

Continuing page 39, counsel stated, "The decisions of the Supreme Court [of Ohio], demonstrate that a taxpayer is entitled to reduction in his assessment if that is required in order to assure him equal treatment." Citations included *Exchange Bank of Columbus v. Hines* (1853), 3 O. S. 1, 15; *Mitchell & Watson v. The Treasurer of Franklin County* (1874), 25 O. S. 143, 156, 158; *The Fair Store Co. v. Board of Revision of Hamilton County* (1945), 145 O. S. 231, 232.

In answer to petitioner's argument on page 8 that finding true value in money precludes consideration of discrimination in levying taxes, we observe the same counsel's contrary opinion in its Lincoln Electric brief on page 41:

> "This Board (Ohio Board of Tax Appeals) has also recognized that, in passing on the statutory 'true value in money,' regard must be given to the taxpayer's claim of discrimination and his right to uniformity of treatment."

Thereupon counsel quoted a number of authorities to support the above statement, including *Hamilton Amusement Company v. Board of Revision of Hamilton County* (1952), 1 Ohio Tax Cases 10,317, noting CCH Paragraph 200-125; *Woolworth Co. v. Cuyahoga County Board of Revision* (1952), 1 Ohio Tax Cases 10,457, noting CCH

Paragraph 200-167; *Sun Oil Co. v. Cuyahoga County Board of Revision* (1953), 1 Ohio Tax Cases 10,529, noting CCH Paragraph 200-198; *Sears, Roebuck and Co. v. Montgomery County Board of Revision* (1953), 1 Ohio Tax Cases 10,561, noting CCH Paragraph 200-210; *Linger v. Board of Revision of Hancock County* (1952), 1 Ohio Tax Cases 10,622, noting CCH Paragraph 200-230; *Ratliff v. Board of Revision of Hamilton County* (1952), 1 Ohio Tax Cases 10,451, noting CCH Paragraph 200-164.

Counsel for petitioner in its Lincoln Electric brief then concluded (page 42):

> "It follows, therefore, that neither the decisions of the Supreme Court nor those of this Board bar consideration by the Board of the taxpayer's claim to the benefits of the constitutional demand of uniformity."

Counsel was persuasive. The Board of Tax Appeals decided the case in favor of the Lincoln Electric Company, fixing the value of the new building at $3,698,360 although the actual cost of construction incurred on tax lien date as conceded by the company was $6,396,835.

Petitioner's quotation on page 7 from *Rollman & Sons Co. v. Board of Revision of Hamilton County,* 163 O. S. 363, 127 N. E. 2d 1 (1955), refers to still another alternative remedy. It was not used by the parties nor before the court in that case. Nor is it in this. The lower boards and court there found a failure of evidence to prove taxpayer's claim of improper functional depreciation. On the issue of discrimination among taxpayers, the court said that "primarily each county auditor adjusts the values, and in the absence of proof to the contrary it is presumed that each county auditor fulfilled this duty in his county." (127 N. E. 2d 6.)

Other cases cited, in a footnote to page 7 of the petition for certiorari, are from the 1920's, which preceded, and brought about the enactment of Sec. 28 U. S. C. A. 1341.

2. **Does a complaint that commercial real estate has been classified distinct from residence property for purposes of taxation, permitted by the United States Constitution, but purportedly prohibited by the Constitution of the State of Ohio, present a federal question?**

The district court answered "no," and was affirmed by the circuit court. We submit these judgments agree with the law as enunciated by this Court.

The Federal Constitution does not prohibit classification of real property for taxation. The states may, consistently with the Federal Constitution, classify property for taxation. They may set up different modes of assessments, valuation and correction, and may tax some kinds of property at higher rates than others. *Nashville C. & St. L. R. vs. Browning*, 310 U. S. 362, 60 S. Ct. 968, 84 L. ed 1254 (1940); *Coulter vs. L. & N. Ry.*, 196 U. S. 599, 25 S. Ct. 342, 49 L. ed. 615 (1905).

To come within the purview of the federal constitution it is necessary, as pointed out in the opinion of Judge Connell, that the discriminatory treatment be such as to subject the taxpayer to taxes not imposed on *others of the same class*. The District Judge cited *Hillsborough v. Cromwell*, 326 U. S. 620, 90 L. ed. 358 (1946), and quoted from it in his opinion as follows (Pet. cert. 16):

> "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on *others of the same class*. The right is the right to equal treatment. He may not complain if equality is achieved by

increasing the same taxes of the other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes *of other members of the class.*' " (Emphasis supplied by the District Court.)

Referring to *Hillsborough v. Cromwell,* Judge Connell further said (Pet. cert. 17):

> "This decision indicates quite clearly that unless there is an allegation of discrimination within a class or an attack on the validity of the classification itself, there is no denial of equal protection and hence, no presentation of a 'federal question.' "

The relief appellant seeks is not for the benefit of the class of commercial property owners. What it seeks in effect is discriminatory treatment in its favor, for it is quite obvious that relief to the entire class of property owners is not requested and cannot be granted in this cause. Appellant if successful will have favored treatment not accorded to all other taxpayers of the same class.

This judgment, here sought to be reviewed, is quite in accord with the law as stated by this Court in *Nashville, Chattanooga & St. Louis Railway v. Browning et al., Constituting the State Board of Equalization of Tennessee,* 310 U. S. 362, 84 L. ed. 1254 at 1257:

> "It must be emphasized that the Company makes no claim that its property is singled out from among other public service corporations for discrimination. Its asserted grievance is common to the whole class. We must put to one side therefore all those cases relied on by the petitioner which invoked the Fourteenth Amendment against discriminations invidious to a particular taxpayer."

The Court then cited as therefore not in point, inter alia, cases relied on in the petition for certiorari, page 6, *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239 (1931); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923); *Greene v. Louisville & Interurban Railroad Company*, 244 U. S. 499 (1917).

This Court continued at 1257:

> "All these cases are inapposite. None denied power to a state to apply different yardsticks to different classes of property. Equally irrelevant are those cases in which this Court, because of the nature of the litigation, was construing the uniformity clause of a state constitution, and was not applying the Fourteenth Amendment. This court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure. See Puget Sound Power & L. Co. v. King County, 264 U. S. 22, 27, 68 L. ed. 541, 546, 44 S. Ct. 261."

Whatever may be this taxpayer's claim under the state constitution and laws there is here no discrimination in a federal sense, and there being no violation of the federal constitution, there is here presented no federal question. In short, a question under the state constitution obviously does not in itself raise a question under the federal constitution.

The Federal Court decided it had no jurisdiction of a complaint grounded upon a violation of state law in *Baker, County Treasurer v. Atchison, T. & S. F. Ry.* (CCA 10th, 1939) (certiorari denied 308 U. S. 620), 106 F. 2, 525. The railroad challenged a tax on the ground of excessive

valuation of its property in claiming violation of the equal protection clause of the Fourteenth Amendment. The Federal court, dismissing the bill for want of jurisdiction, said that if the challenge were sustained the tax would be erroneous and illegal within the Colorado statute authorizing a suit at law in the State court to recover an erroneous or illegal tax. Hence, the railroad was not entitled to the Federal court's aid since it had an adequate remedy at law in the State court, citing Judicial Code 24 (1) as amended by the Act of 1937, 28 U. S. C. A. 41 (1). The court further held that Federal courts should reluctantly interfere by injunction with the fiscal affairs of the State (syl. 6), and that the State courts bear responsibility with Federal courts to guard and protect rights secured by the Constitution of the United States (syl. 7).

28 U. S. C. A. 41(1) quoted by the court is now 28 U. S. C. A. 1341, which provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state. June 25, 1948, c. 646, 62 Stat. 932."

The federal courts have traditionally declined jurisdiction under this and predecessor statutes in state tax cases. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 63 S. Ct. 1070, 87 L. ed. 1407 (1943); *Hackensack Water Co. v. North Bergen Tp.*, D. C. N. Y. 103 F. Supp. 133 (1952), affirmed 200 F. 2d 313; *Reiling v. Lacy*, D. C. Md., 93 F. Supp. 462 at 467 (1950), dismissed 341 U. S. 901, 71 S. Ct. 614, 95 L. ed. 1341.

The opinion here of the U. S. Court of Appeals that first resort is to the state courts and then to the U. S. Supreme Court is supported in *In re New York, S. & W. Ry.*

Co., D. C. N. J., 36 F. Supp. 158 (1940); *Lawrence Print Works v. Lynch*, C. C. A. Mass., 146 F. 2d 996 (1945), citing *Matthews v. Rodgers*, 284 U. S. 521, 52 S. Ct. 220 (1932).

There is no federal jurisdiction here and the case is res adjudicata because petitioner began his complaint before the Ohio tax tribunals and then, following adverse decisions, took no appeal, but permitted the decision of the Ohio Board of Tax Appeals to become final and conclusive. *Autokefalos Orthodox Spiritual Church of St. George, The Tropeophoros v. Hallaban*, D. C. N. Y., 103 F. Supp. 389 at 390 (1952).

Finally, inasmuch as the opinions of the court below did not say that state jurisdiction necessarily defeats federal jurisdiction, nor did they say a federal court cannot enforce a state right, cases on pages 10-13 of the petition are not in point.

CONCLUSION.

Petitioner has misconstrued the reasoning of the U. S. Circuit Court in finding for respondents. It did not hold state jurisdiction necessarily bars federal jurisdiction.

The remedies provided by the State of Ohio were adequate. This Court has said so, and the court of appeals so held.

Construction of the Ohio Constitution is a state question. Mere anticipation or allegation of a denial of equal protection of the laws does not make it a federal question.

On the contrary, the presumption is that the State courts will enforce the United States Constitution. Should they so fail, there is an appeal to federal jurisdiction, as the Circuit Court said in its opinion (Pet. appendix 19).

This was sound law, conducive to an orderly separation of authority and work between the United States and the State of Ohio courts.

Accordingly, we respectfully submit judgments below were in accord with law, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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